No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY and WILLIAM G. SCHULTZ,

Appellees.

APPELLEES' BRIEF

T. E. SCARBOROUGH,
Ellis Building, Phoenix, Arizona
Attorney for Appellees

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PREAMBLE

While it is the opinion of the appellees in this case that the appellant has not complied with Sections 2 and 3 of Rule 20 of the Rules of Practice of this Court in the preparation and filing of his brief, the appellees will not make an issue of that fact, since we are aware that the Court is far more familiar with its own rules of practice than counsel, who have only a limited knowledge of those rules.

It will be noted that Mr. C. A. Edwards, who was formerly connected with this case, comes in for a great deal of comment in appellant's brief, and in tribute to Mr. Edwards the appellees desire to make it known to the Court that Mr. Edwards is now a member of the armed forces of the United States Government and is no longer longer an attorney in this case.

APPELLEES' STATEMENT

Appellees feel that the appellant has not given a clear statement of the subject matter in his brief, and we are therefore making the following brief statement or outline of what has transpired.

Appellant, plaintiff below, filed his original complaint in the District Court of the United States, for the District of Arizona, against the appellees, asking for damage and other relief, alleging, among other things:

IV.

> "That the defendants, E. J. Gotthelf, Charles C. Bradbury, Charles S. Smith and William G. Schultz, are the members of the Board of Medical Examiners, operating under the Basic Science Laws of 1935.
>
> "That J. H. Patterson has, at all times, been the acting Secretary of the said Board of Medical Examiners."

V.

"That the defendants and each of them have, for a long period of time, since 1933, repeatedly refused to give the plaintiff an examination for a license to practice medicine, though often requested." (Transcript of Record, p. 13-14).

The prayer of appellant's original complaint was:

"Wherefore, plaintiff prays judgment against the defendants and each of them in the amount of Fifty Thousand ($50,000.00) Dollars, and for such other relief as the Court may deem just and proper." (Transcript of Record, p. 17).

On March 20, 1943, this original complaint was abandoned by the plaintiff in favor of his second amended complaint. (Transcript of Record, p. 30).

Before all of the defendants, appellees herein, were served with summons and before any amendments were filed, Mr. C. A. Edwards appeared before the Court on January 25, 1943, and obtained an order of the Court extending for twenty days from that date the time of all of the defendants to answer. (Transcript of Record, p. 17) Thereafter, and on February 2, 1943, the appellant filed what he termed "corrected application to set order aside, extending time to answer, and motion for default". (Transcript of Record, p. 22) On February 8, 1943, the Honorable Dave W. Ling, the United States District Judge, entered an order denying plaintiff's corrected applica-

tion to set aside order extending time to answer. (Transcript of Record, p. 26) On the same day, the appellees, defendants below, filed their motion to dismiss plaintiff's complaint, the grounds for the motion being that the Court had no jurisdiction over the subject matter of the action, and that the complaint does not state a claim upon which relief can be granted. This motion was signed by T. E. Scarborough and C. A. Edwards for all of the defendants other than William G. Schultz. (Transcript of Record, p. 26) On February 10th, the appellant filed an application for an order removing C. A. Edwards, Assistant Attorney General, as counsel for the defendants. (Transcript of Record, p. 28)

Appellees find no record of any action having been taken by the Court on such application. The motion to dismiss plaintiff's complaint was granted, and the Court entered an order dismissing the case, for the reason that the (second amended) complaint did not state a cause of action, (Transcript of Record, p. 28) from which order the appellant filed notice of appeal on the 30th day of April, 1943. (Transcript of Record, p. 49).

ARGUMENT

The questions for the determination of this Court, as the appellees view them, are:

FIRST: Is this appeal premature?

SECOND: Was the appellant ever entitled to default?

THIRD: Does the second amended complaint present any question upon which the Federal Court has jurisdiction?

FOURTH: Does the second amended complaint set forth any grounds upon which relief could be granted?

We will take up the above questions in their order.

I.

THE APPEAL IS PREMATURE.

The plaintiff did not await a final judgment, nor did he make known that he did not seek to file other amendments before he gave notice of appeal. Defendants had no opportunity to have final judgment entered for their costs.

For the above reasons, none of the orders entered were final judgments from which an appeal may be taken.

Phoenix v. Jones, 21 Ariz. 432;

189 Pac. 242.

Rice v. Hansen, 27 Ariz. 529;

234 Pac. 563.

Cardiff v. Winslow, 32 Ariz. 442;

259 Pac. 881.

The Federal courts follow the practice prevailing in the State courts.

Wheeler v. Harris, 13 Wall 51;

20 L. Ed. 531.

II.

PLAINTIFF'S NOT ENTITLED TO DEFAULT

(a) Plaintiff's Original Action Was Against State Board.

Before all of the defendants were served with summons in this action, Mr. Edwards, as Assistant Attorney General, appeared before the Court and obtained additional time within which to answer. This was done in his capacity as Assistant Attorney General. Since it is the duty of the Attorney General of the State of Arizona to defend all official boards and agencies of the State, there is no doubt but that the Attorney General had authority to appear and defend

against the original complaint. The Arizona Code provides:

> "4-503. Legal advisor of departments. The attorney-general shall be the legal advisor of all departments of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, no official, board, commission, or other agency of the state, other than the attorney-general, shall employ any attorney or make any expenditure or incur any indebtedness for legal services. The attorney-general may, when the business of the state requires, employ assistants. (R. C. 1928, PP 52a as added by Laws 1931, ch. 30, PP 1, p. 52)". (4-503, Arizona Code Anno. 1939).

It cannot be determined from the original complaint filed herein whether the defendants were being sued as individuals or as a State board. Certainly, from paragraphs IV and V of the original complaint alleging the defendants to be members of the Board of Medical Examiners and operating under the Basic Science Laws of 1935 and that the defendant, J. H. Patterson, was the acting Secretary of said Board of Examiners, and that the defendants had repeatedly refused to give the plaintiff an examination for a license to practice medicine, followed with a prayer for $50,000 damage and *for such other relief as the Court may deem just and proper*, it would certainly seem that the plaintiff was seeking to have some judgment of the Court rendered against the defendants

in their official capacity as a board, or agency of the state. It was not until the second amended complaint was filed that the plaintiff, appellant herein, made it definitely clear that he was suing defendants individually and not as members of the Board of Medical Examiners.

Since the second amended complaint was filed, neither Mr. Edwards nor any member of the Attorney General's Office has taken any active part in the defense of this action.

(b) Plaintiff's Abandonment of Original Complaint Precludes Any Objection Being Raised to Rulings Affecting It.

The second amended complaint supersedes all previous complaints, and the filing of the same was an abandonment of plaintiff's original pleadings, and the original pleadings filed herein are no longer part of the record. By the filing of the second amended complaint, the plaintiff thereby elected to stand or fall on the allegations of the second amended complaint, and all subsequent proceedings in this case must relate to the second amended complaint. The appellant now cannot be heard to complain of any action of the Court affecting the original complaint.

Bedell v. Baltimore etc. Railroad Co.,
245 Fed. 788.

Lasky v. New Town Mining Co.,
56 Fed. 628.

U. S. v. Gentry
119 Fed. 70.

Shafer v. Acklin
205 Iowa 567
218 N. W. 286

Jennings v. Fayne
226 Ky. 290
10 S. W. (2d) 1101.

McLain Bank v. Pascagoula Natl. Bank
150 Miss. 738
117 SO. 124.

Arkla Lumber Co. v. Henry Quellmalz

Lumber Co., 252 S. W. 961

Scott v. Price
123 Okla. 172
247 Pac. 103.

Atherton v. Clearview Coal Co.,
267 Pac. 425.

Love v. Virginia Power Co.
86 W. Va. 393
103 S. E. 352.

Montana Natl. Bank v. Bingham
83 Mont. 21
269 Pac. 162.

Ryan v. Old Veterans Mining Co.,
35 Idaho 637
207 Pac. 1076.

III.

THE COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION

(a) The 14th Amendment Does Not Give the Federal Courts Jurisdiction of This Action.

The appellant says that his rights have been violated and relies on the Fourteenth Amendment of the Federal Constitution to give the Court jurisdiction over the subject matter of this action. This case appears to be one of those cases often referred to as "those last resorts of desperate cases."

Plaintiff complains that he "has been denied the benefits and rights granted him under and by the provisions of the Fourteenth Amendment to the Constitution of the United States", (Par. VII, Second Amended Complaint, p. 43, Transcript of Record) and then proceeds to quote the Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

It has been universally held that the Fourteenth Amendment adds nothing to the rights of one citizen as against another. It simply furnishes a guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen.

U. S. v. Cruikshank
92 U. S. 542, 23 L. Ed. 588.

Louisville v. Cumberland Tel. etc. Co.
155 Fed. 725.

U. S. v. Powell
151 Fed. 648 (affirmed 212 U. S. 564).

U. S. v Moore.
129 Fed. 630.

To quote from United States v. Cruikshank, supra: "The Fourteenth Amendment prohibits a state from depriving any person of life, liberty or property without due process of law, but adds nothing to the rights of one citizen against another". It is apparent from the foregoing authorities that if the appellant has been damaged, his action should be against the State of Arizona or some duly constituted board or commission of the State. He is seeking here in a backhanded way to attack the constitutionality of a law passed by the Legislature of the State of Arizona without any allegation or other showing that the defendants, or any of them, have any interest in the enforcement of the law or that they are in any way charged with the duty of enforcing it. The method adopted by the appellant amounts to a collateral attack on the constitutionality of a statute. It is well settled that the

constitutionality of a statute will not be determined on the question being raised in a collateral proceeding.

U. S. v. Delaware etc. Co.,
213 U. S. 366
53 L. Ed. 836 (reversing 164 Fed. 215).

Wright v. Kelly
4 Idaho 624, 43 Pac. 565.

Wadhams v. San Francisco Co.,
80 Ore. 64, 156 Pac. 425.

The plaintiff is apparently attempting to ride two horses at one time. In one breath he says that the defendants "because of envy, bias and prejudice toward him and in fear of his competition and qualifications in the method and practice of the healing arts, . . . have refused to issue him a license to practice medicine and surgery in the State of Arizona". (Second Amended Complaint, Par. VI, p. 43, Transcript of Record) Next, he says the Basic Science Law of Arizona, which prescribes the qualifications of one seeking to have a license to practice medicine issued him is unconstitutional.

If the Basic Science Law of Arizona is what is preventing the plaintiff from practicing medicine, then his action, if any he has, should be against the State of Arizona, or any board charged with the duty of enforcing the law.

The gist of plaintiff's action is set forth in Paragraph VI, second amended complaint:

VI.

"That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well knowing that plaintiff was and is in every respect qualified to have issued to him a license to practice medicine and surgery in Arizona, and for other personal reasons best known to each of them, and because of envy, bias and prejudice toward him, and in fear of his competition and qualifications in the methods and practice of the healing arts, have refused to accept his credentials and to issue him a license to practice medicine and surgery in Arizona, and have also refused to give him an examination; all with knowledge that their acts and conduct herein complained of are wrongful, unlawful and unconstitutional." (Transcript of Record, p. 43).

It is one of the inherent rights of the plaintiff and every other person to go upon the streets of a certain village or city in the peaceful pursuit of his daily routine of life, but if one or all of the defendants, or

any other individual, should prevent him from so doing, even if actual force is used, the Fourteenth Amendment would afford him no relief, and he would have to look elsewhere than the Federal courts for redress.

(b) The Federal Courts Do Not Acquire Jurisdiction of This Case Under the Anti-trust Act.

There is no allegation in the second amended complaint that the plaintiff is now, or intends to be engaged in interstate commerce.

Title 15, Laws of the United States, is what is commonly known as the Sherman Anti-Trust Act:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by punishment by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"3. Every contract, combination in form of trust or otherwise, or conspiracy, in trust or otherwise, or conspiracy, in restrain of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any States or State or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is

found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. Act of Congress, July 2, 1890 (26 U. S. St. at L. 209 c 647) Comp. St. 8820 et. seq."

No where in the 2nd Amended Complaint does it appear that the acts complained of are in restraint of trade in interstate commerce. Without such an allegation the plaintiff has no action.

U. S. v. Paramount Famous Lasky Corporation, 34 Fed. (2) 984; 282 U. S. 30. (Cited in App. Brief).

Majestic Theatres Co. v. United Artists Corp. 43 Fed. (2) 991. (Cited in App. Brief).

In order to constitute a violation of the Sherman Anti-Trust Act, the acts complained of must affect and operate directly upon commerce among the states of the United States or with foreign nations.

Industrial Association of San Francisco, v. U. S., 268 U. S. 64, 69 L. Ed. 849.

Addyston Pipe etc. Co. v. U. S., 175 U. S. 211; 44 L. Ed. 136.

Hopkins v. U. S., 171 U. S. 578, 43 L. Ed. 290.

U. S. v. Trans-Missouri Freight Ass'n. 166 U. S. 290, 41 L. Ed. 1007.

In order to bring a case within the Anti-Trust Act, it must appear that the combination or conspiracy complained of interferes with and restrains the free and natural flow of trade in interstate commerce.

Eastern States Retail Lumber Deals Assoc. v. U. S.
234 U. S. 600; 58 L. Ed. 1490.

U. S. v. Union Pac. R. Co.
226 U. S. 61; 57 L. Ed. 124.

The act does not authorize exemplary damages, as prayed for. Sec. 7 of the act, supra.

Neither the Sherman Act or the Clayton Act has any application to intra-state comerce.

Quincy Oil v. Sylvester
228 Mass. 95; 130 N. E. 217.

IV.

THE COMPLAINT DOES NOT SET FORTH ANY GROUND UPON WHICH RELIEF CAN BE GRANTED

(a) No Duty Alleged On Part of Defendants.

The plaintiff seeks to recover damages from the defendants because of their refusal to issue him a li-

cense to practice medicine and surgery in the State of Arizona.

Nowhere in the second amended complaint is there an allegation that the defendants, nor any or either of them, have any right, duty, power or authority to issue to the plaintiff or any other person a license to practice medicine or surgery.

A failure to make such an allegation is fatal.

> Menefee Lumber Co. v. MacDonald et al. 122 Or. 579; 260 Pac. 444.
>
> Bermingham v. Cheetham, 19 Wash. 657; 54 Pac. 37.
>
> Hollenbeck v. Winnebago County, 95 Ill. 148; 35 AmR151.

(b) Practice of Medicine Regulated by Statute.

The second amended complaint shows on its face that the practice of medicine and surgery in Arizona is fully regulated by law, setting up a Board of Medical Examiners (Paragraphs II and III, Second Amended Complaint, Transcript of Record, p. 31 to 41) clothed with all the powers and duties existing and necessary to pass upon plaintiff's application for license to practice medicine and surgery in Arizona.

We submit that the action of the District Court in

ordering the case dismissed should be affirmed, and such penalty assessed for frivolous appeal as the facts and law may warrant.

Respectfully submitted,

T. E. SCARBOROUGH
Ellis Building, Phoenix, Arizona,
Attorney for Appellees,

J. H. Patterson, E. J. Gotthelf, Charles S. Smith, and Charles C. Bradbury.